1987

County Board of Equalization of Salt Lake County, State of Utah v. State Tax Commission of Utah and Kennecott Corporation : Brief of Respondent

Utah Supreme Court

James B. Lee, Kent W. Winterhollder; Parsons, Behle and Latimer; David Wilkinson; Attorney General of Utah; Maxwell A. Miller; Assistant Attorney General; Glen E. Davies; Attorney for Respondent.

David E. Yocom; Salt Lake County Attorney; Bill Thomas Peters; Attorneys for Petitioner.

IN THE SUPREME COURT OF THE STATE OF UTAH

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COUNTY BOARD OF EQUALIZATION OF SALT LAKE COUNTY, STATE OF UTAH, Petitioner,	)	Case No. 87-0368
vs.	)	Priority Category 14-a
STATE TAX COMMISSION OF UTAH, ex rel, KENNECOTT CORPORATION, Respondent.	)	

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BRIEF OF RESPONDENT, STATE TAX COMMISSION OF UTAH, EX REL KENNECOTT CORPORATION

APPEAL BY THE COUNTY BOARD OF EQUALIZATION OF SALT LAKE COUNTY FROM THE DECISION OF THE UTAH STATE TAX COMMISSION ISSUED SEPTEMBER 10, 1987

R.H. HANSEN, CHAIRMAN, TAX COMMISSION OF UTAH

JAMES B. LEE
KENT W. WINTERHOLLER
PARSONS, BEHLE & LATIMER
185 So. State Street, Suite 700
P.O. Box 11898
Salt Lake City, UT 84147-0898
Attorneys for Respondent

GLEN E. DAVIES
310 South Main, Suite 1200
Salt Lake City, UT 84111
Attorneys for Amicus Curiae
Utah Farm Bureau
Federation

DAVID WILKINSON
Attorney General of Utah
MAXWELL A. MILLER
Assistant Attorney General
130 State Capitol Bldg.
Salt Lake City, UT 84114
Attorneys for the Utah State
Tax Commission

DAVID E. YOCOM
Salt Lake County Attorney
BILL THOMAS PETERS
Special Deputy Salt Lake
County Attorney
#9 Exchange Place, Ste. 1000
Salt Lake City, UT 84111
Attorneys for Petitioner

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310 South Main, Suite 1200
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DAVID WILKINSON
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Assistant Attorney General
130 State Capitol Bldg.
Salt Lake City, UT 84114
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DAVID E. YOCOM
Salt Lake County Attorney
BILL THOMAS PETERS
Special Deputy Salt Lake
County Attorney
#9 Exchange Place, Suite 1000
Salt Lake City, UT 84111
Attorneys for Petitioner

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JURISDICTION

Respondent, ("Kennecott"), agrees with the statement of jurisdiction contained in petitioner's brief. Kennecott will not in this brief restate the jurisdiction of the court to hear this appeal.

STATEMENT OF NATURE OF PROCEEDINGS BELOW

This appeal by the County Board of Equalization of Salt Lake County (the "County"), is from a formal decision of the Utah State Tax Commission, (the "Commission"). In that decision the Commission determined that the County had improperly changed the assessment of property owned by Kennecott, and leased to Hercules Incorporated ("Hercules"), so as to deny assessment of that property as agricultural under the Utah Farmland Assessment Act, Utah Code Ann. § 59-2-501 et seq. (1987). The property consists of approximately 3,990 acres owned by Kennecott, which is leased both to Hercules and to two farm and ranch operations for grazing beef cattle and growing red winter wheat. The decision of the Commission determining that this property was to be assessed under the Utah Farmland Assessment Act, supra, was issued on September 10, 1987. Petition for Writ of Review was filed by the County on October 8, 1987. The Writ of Review was issued on October 8, 1987.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the County erroneously remove the property subject to this appeal from assessment under the Utah Farmland Assessment Act, even though that land is actively used for agricultural production?

2. If the property is otherwise qualified for assessment under the Utah Farmland Assessment Act, does the property become disqualified because it is also leased to Hercules?

STATEMENT OF THE CASE

The property subject to this appeal consists of approximately 3,990 acres, in 14 parcels, surrounding a rocket motor manufacturing plant being constructed by Hercules in 1985. The parcel upon which Hercules' rocket motor manufacturing facility is located is also leased by Hercules from Kennecott, under the same lease as is the property which is the subject of this appeal.

Fifteen hundred (1500) acres of the property involved in this appeal are also leased by Kennecott to Don Rushton, who grows red winter wheat on that property. The remainder of the 3,990 acres of property is leased to Johnson Cattle Company, along with approximately 11,000 other acres of Kennecott property. Johnson Cattle Company grazes beef cattle on this property.

Despite qualification of Kennecott's property for agricultural assessment, the County arbitrarily, and without justification, removed the property leased to Don Rushton and Johnson Cattle Company from assessment under the Utah Farmland Assessment Act. For many years prior to 1985 the subject property was assessed by the County under the Utah Farmland Assessment Act because it was used for agricultural purposes. (Rec. 89, 584-590, 591-594). After receiving notice that the County would not assess this property under the Farmland Assessment Act in 1985, even though it had done so for at least two years prior to 1985, Kennecott filed a notice of appeal with the Salt Lake County Board of Equalization, which Board denied Kennecott the relief it sought. (Rec. 103-109). Thereafter, Kennecott appealed that denial to the Commission.

The Commission, on September 3, 1986, issued an informal decision reversing the County's decision and determining that the land was actively devoted to agricultural use, including grazing beef cattle and growing grain, and that as such, was subject to valuation and assessment under the Utah Farmland Assessment Act pursuant to the provisions of Utah Code Ann. § 59-5-90 (Supp. 1986). (Rec. 88-95). The Commission further determined that Hercules' rights to the subject property, under its lease with Kennecott, did not preclude assessment of this property under the provisions of the Utah Farmland Assessment Act. (Rec. 92). The specific finding of the

Commission was that Hercules, under its lease, had only the right to restrict the construction of habitable buildings by Kennecott, or any other person, on the property, and that the property was fully subject to being leased or otherwise devoted to agricultural use by Kennecott. (Rec. 92).

The County then filed a petition for formal hearing with the Commission. A formal hearing was held on December 30, 1986. On September 10, 1987 the Commission issued its formal decision determining that the property was qualified for assessment under the Utah Farmland Assessment Act and ordered the Salt Lake County Assessor to assess the land as agricultural property and to continue so assessing the land under the Utah Farmland Assessment Act until the property failed to meet the requirements of that Act. (Rec. 44-52). The County thereupon filed a petition for writ of review.

STATEMENT OF FACTS

The approximate 3,990 acres which are the subject of this appeal are owned by Kennecott and are leased by Kennecott to Don Rushton, to Johnson Cattle Company and to Hercules. (Rec. 44-52, 88-95, 584-590, 591-594). In addition to this property which is leased to Hercules, Kennecott also leases an additional 317 acre parcel to Hercules. (Rec. 47, 88-89, 542-551). Upon this additional parcel Hercules was constructing, at the time of assessment, a rocket motor manufacturing

facility. (Rec. 47, 88-89, 542-551). The parcel upon which the rocket motor manufacturing facility was being constructed is not part of this appeal, and neither Kennecott nor Hercules is asserting that this 317 acre parcel is properly qualified for assessment under the Utah Farmland Assessment Act. (Rec. 47, 88-89, 542-551).

In addition to leasing this 317 acre site, Hercules determined it needed to be able to restrict activities upon surrounding property so as to preclude any habitable buildings being constructed and to foreclose the storage of explosives or flammable materials. (Rec. 44-52, 88-95, 622-23). As a result, in addition to the 317 acre site for the rocket motor manufacturing facility, Hercules also leased from Kennecott approximately 3,600 acres surrounding the manufacturing site. The only restrictions in Hercules' lease with Kennecott on the property surrounding Hercules' manufacturing facility was that no habitable buildings could be constructed, and no explosives or flammable materials could be stored. (Rec. 622-623). Other uses of this property by Kennecott, or by persons to whom Kennecott may lease, including agricultural uses, were not restricted. (Rec. 92). Thus, under its lease with Hercules, Kennecott retained the right to either actively devote the property to agricultural use itself, or to lease the property to farmers and ranchers for agricultural use. (Rec. 622-623.)

Kennecott has actively devoted this property, before its lease to Hercules, to agricultural use and production by leasing it to Johnson Cattle Company and to Don Rushton. (Rec. 92, 584-590, 591-594). Johnson Cattle Company has grazed beef cattle on a part of the property, Don Rushton has grown red winter wheat on the other portion of the property. (Rec. 92, 584-590, 591-594). Agricultural use continued after Kennecott's lease to Hercules. (Rec. 92, 584-590, 591-594). There is no dispute that the property which is the subject of this appeal is used by Kennecott's lessees, Johnson Cattle Company and Don Rushton, for agricultural purposes. (Rec. 92, 584-590, 591-594). Hercules' lease with Kennecott merely operates much in the same fashion as does a restrictive covenant. (Rec. 92). Kennecott may use the property for any purpose it desires just so long as no habitable structures are constructed, and no explosives or flammable materials are stored on the property. (Rec. 622-623).

The Commission, after an informal, and a subsequent formal hearing, determined that the property was qualified for assessment under the Utah Farmland Assessment Act. The Commission found that the property fully complied with the requirements of Utah Code Ann. § 59-5-87 (Supp. 1986), as follows:

> 3. Although the land owner must apply for FAA assessment, if the land is actively devoted to agricultural use, is five contiguous acres or more in area, and has a gross income from agricultural activities of at least $1000 per year, the

> land is to be valued at the value which the land has for agricultural use if it has been held in agricultural use for at least two years at the time of application. Utah Code Ann. § 59-5-87 (Supp. 1986).
>
> 4. Grazing beef cattle and growing grain crops are agricultural uses. Utah Code Ann. § 59-5-88 (1953). (Rec. 49-50).

The Commission determined that the County had erroneously and improperly assessed the property, and directed the County to assess the property as property devoted to an agricultural use under Utah's Farmland Assessment Act, and to continue to so assess that property until it was removed from agricultural use. (Rec. 49-51).

SUMMARY OF ARGUMENTS

The property owned by Kennecott, and concurrently leased to Hercules, and to Don Rushton and Johnson Cattle Company, is qualified for assessment under the Utah Farmland Assessment Act because that property is being actively used for grazing beef cattle and growing red winter wheat. As such, it is property which is "actively devoted to an agricultural use."

The property also provides a buffer zone between a rocket motor manufacturing facility and other habitable structures, or other property upon which habitable structures can be constructed. Hercules leases the property in order to restrict the construction of habitable buildings on property surrounding

its rocket motor manufacturing facility pursuant to the provisions of federal, state and local law. This is done for safety purposes by Hercules.

Hercules' lease rights only restrict construction of habitable buildings, or the storage of explosives or flammable materials. The property may be used by Kennecott under its lease with Hercules for any other purpose whatsoever, and is so used by Kennecott under its leases with Johnson Cattle Company and Don Rushton for grazing beef cattle and growing red winter wheat. The lease to Hercules by Kennecott does not disqualify the property for assessment under Utah's Farmland Assessment statute.

As a result, the Tax Commission was correct in determining that this property met the qualifications of the Utah Farmland Assessment Act and was to be assessed under that statute.

ARGUMENT

I. THE PROPERTY LEASED BY KENNECOTT TO HERCULES WHICH IS THE SUBJECT OF THIS APPEAL, WHICH IS ALSO LEASED TO JOHNSON CATTLE COMPANY AND DON RUSHTON, IS USED BY KENNECOTT, BY HERCULES, BY JOHNSON CATTLE COMPANY, AND BY DON RUSHTON FOR AGRICULTURAL PURPOSES AND SHOULD BE ASSESSED UNDER THE UTAH FARMLAND ASSESSMENT ACT.

Utah Code Ann. § 59-5-87 (Supp. 1986), provides that land which is actively devoted to an agricultural use, which is greater than five contiguous acres in area, and which provides

a gross income of $1,000 per year, not including rental income, is, upon application by the owner, to be assessed as agricultural property. Utah Code Ann. § 59-5-88 (1974) defines "actively devoted to an agricultural use" as follows:

> Land shall be deemed to be in agricultural use when devoted to the raising of plants and animals useful to man, including but not limited to: forages and sod crops; grains and feed crops; dairy animals, poultry, livestock, including beef cattle, . . .

Thus, if property which is in excess of five acres in area is used by the owner, or another with the permission of the owner, for raising beef cattle, or growing grain, it is qualified for assessment under the Utah Farmland Assessment Act so long as the property has been so used for at least two years prior to the assessment year, and the property produces gross revenue in excess of $1,000 per year as a result of the agricultural use.

There is no question in this case that the approximately 3,990 acres which are subject to this appeal meet these qualifications. The property is more than five contiguous acres in area, produces from its agricultural use more than $1,000 gross income per year, and has been used for agricultural production for at least two years prior to the date of the assessment year here at issue, 1985. (Rec. pp. 49-51)

The situation presented by this case is very similar to the situation presented to the Oregon Supreme Court in Ritch

v. Department of Revenue, 261 Or. 78, 493 P.2d 38 (1972). In Ritch approximately 96,000 acres were leased by an agency of the State of Oregon to Boeing Corporation for "industrial or industrial research and development purposes." Id., 493 P.2d 40. In that case, Boeing granted subleases for agricultural purposes to four ranchers living in the general area. Of the approximately 96,000 acres, Boeing subleased approximately 94,000 acres for agricultural purposes. The remaining 2,000 acres were used by Boeing for industrial development. There was no application made for farm use assessment on these remaining 2,000 acres.

The lower court denied to the owner of the property, the Department of Veterans Affairs, special farm use assessment. In the Ritch case, the lease to Boeing by the Department of Veterans Affairs did not prohibit use of a portion of the property for agricultural purposes. Furthermore, in Ritch Boeing desired a large tract of ground as a "buffer zone for noise suppression between test areas and privately owned property." Id., 493 p.2d 41.

The Ritch court, in addressing the argument that because the land was used as an industrial buffer zone it became industrial property not qualified for agricultural assessment, stated as follows:

> For purposes of applying the farm use statute, we do not believe that Boeing's reason for wanting 96,000 acres is as important as the use that is actually being made of the

> property. As of 1969, the tax year involved herein, 94,000 acres were actually being used for farm purposes. [Emphasis added], Id.

This case presents a situation almost identical to that presented in Ritch. In this case Kennecott leases to Hercules approximately 3600 acres which Hercules desires in order to buffer Hercules' activities as a rocket motor manufacturer from surrounding property. Hercules does this so that no habitable structures will be adversely impacted by Hercules' activities. However, just as in Ritch, where Boeing permitted agricultural activities to occur on the property which it leased from the state as an industrial buffer zone, Hercules permits agricultural use on its leased property. As a result, just as in Ritch, the property is "actively devoted to an agricultural use."

The County argues that because this ground is subject to a lease to Hercules, the property is not being "actively devoted to an agricultural use". However, the use to which the property is being put is agricultural. There was agricultural production on this property in the assessment year, and for at least two years prior thereto. Kennecott believes the language from Ritch by the Oregon Supreme Court may provide guidance in this case. In determining that the property in Ritch was qualified for farm land assessment under the Oregon statute, the Oregon Supreme Court stated as follows:

> Apparently the plaintiff's primary objection to the lands receiving a farm use classification is that neither the Department of Veterans' Affairs, as the owner, nor Boeing Company, as the lessee, is the one who is doing the actual farming on the lands. Farm lands are not rendered ineligible for farm use classification merely because they are subject to a lease or a sublease. [Emphasis added.] It is not necessary that the owner of the lands be the one who prepares the soil and harvests the crop. If this were true, then many prime farm lands in the state would be denied farm use classification because of the ownership of the land, not because of the use of the land. It is true that ORS 308.375 requires the application for special farm use assessment for unzoned farm lands to be made by the owner for farm use classification. ORS 308.380 commands the county assessor to consider "the use of the land by the owner, renter or operator" in determining entitlement to special farm use classification. Throughout all the statutes relating to farm use assessment for both zoned and unzoned farm lands, all references are to the lands and the use thereof, e.g., agricultural lands, lands devoted to farm use, [emphasis added] operation of the lands according to agricultural practices, and income from farm use of the land. Id. 493 P.2d 41-42.

This is precisely what is occurring in this case. The land at issue has co-ownership, just as the land in Ritch had co-ownership. Hercules is a lessee of Kennecott. Hercules and Kennecott lease the property to farmers and ranchers for agricultural use. The land is used for agricultural purposes and is, as a result, "actively devoted to an agricultural use."

A case similar to this case and to Ritch was decided in 1968 by the Connecticut Supreme Court. In Marshall v. Town

of Newington, 156 Conn. 107, 239 A.2d 478 (1968), the Connecticut court considered the assessment of certain property under Connecticut's Farmland Assessment Act, where the property at issue was zoned for industrial use, but was used for growing corn. In Marshall the landowner's principal source of income from the property was not from the corn which was grown there, but was from other sources. 239 A.2d 480-81.

In determining that the landowner's property qualified for assessment under the Connecticut Farm Land Assessment Act, the Marshall court stated:

> Obviously, the conclusion that the produce raised on the plaintiffs' land was a minor source of their total income from all sources is completely irrelevant to the question whether they were using a particular piece of land for farming purposes. Equally irrelevant is a finding that adjacent industrial lands were sold for high prices. Furthermore, although the conclusions that the highest and best use of a particular parcel was for industrial purposes and that it was zoned for industrial purposes at the request or instigation of the owner would be relevant to a determination of the land's fair market value, such conclusions are not relevant to a determination as to whether in fact the land is being used for farming purposes. Id., 239 A.2d 481.

And further:

> From this examination, the conclusion is inescapable that the court's decision as to a proper classification of the land was predicated, not on the actual use to which the land was being put, which is the criterion the statute specifies, but on the fact that its highest and best use would be for industrial purposes and that at the

> instigation of the plaintiffs it was in a zone which would permit such a use. This was error. Id.

In this case the land is being used, in conformity with all lease agreements, for agricultural purposes. The land is leased to a rancher in order to raise beef cattle, and is leased to a farmer in order to raise red winter wheat. It is land which is "actively devoted to an agricultural use." In fact, Utah's Farmland Assessment Act requires that this land be assessed for agricultural purposes. The Act states as follows:

> The assessor in valuing land which qualifies as land actively devoted to agricultural use under the test prescribed by this act, and as to which the owner thereof has made timely application for valuation, assessment and taxation hereunder for the tax year in issue, shall consider only those indicia of value which such land has for agricultural use as determined by the state tax commission. Utah Code Ann. § 59-5-90 (Supp. 1986).

Thus, the only relevant questions which the assessor, the County and the Tax Commission may inquire into respecting assessment under Utah's Farmland Assessment Act are as follows:

1. What are the "tests prescribed by this Act"?

2. Has the owner made a timely application for valuation, assessment and taxation for the tax year at issue?

The tests, for agricultural use, prescribed by the statute, are clearly set out in Utah Code Ann. § 59-5-89 (Supp. 1986). The requirements are that the land must:

(a) Be not less than five contiguous acres in area;

(b) Be used for an agricultural purpose as defined in the statute under Utah Code Ann. § 59-5-88 (1974); and

(c) Produce a gross income from agricultural use of at least $1,000 per year, without regard to rental income.

Under Utah's Farmland Assessment Act the Utah legislature intended that property which is actively being used for agricultural purposes is to be assessed under the Act regardless of any other use to which the property is being, or may be, put. This becomes clear when one examines the enabling Utah constitutional provision under which the Utah Farmland Assessment Act was enacted. That provision states as follows:

> Land used for agricultural purposes may, as the Legislature prescribes, be assessed according to its value for agricultural use without regard to the value it may have for other purposes. Utah Constitution, Art. XIII, Sec. 3 (Supp. 1987).

The legislature has determined that if land in Utah is used for agricultural purposes, that land is qualified for assessment under the Utah Farmland Assessment Act. That is precisely what is presented in this case. Kennecott's property is used for an agricultural purpose, agricultural production is occurring on that property in every year, and the property should be assessed under Utah's Farmland Assessment Act just as the property in the Ritch case and the Marshall case were used for agricultural purposes and were assessed as agricultural property.

The County argues that because Kennecott derives substantial income from this property as a result of Kennecott's lease to Hercules, the property is not qualified for agricultural assessment. The argument is that this means the property's primary, or main use, is industrial, not agricultural. However, the Utah legislature has determined that other uses to which property in agricultural use can, is, or may be, put are not relevant in considering whether that land qualifies for assessment under Utah's Farmland Assessment Act. The legislature set out a use test in Utah's Farmland Assessment Act. In order to qualify for agricultural assessment, the property, in simple terms, only needs to meet the use test set out in the statute. Consequently, although the arguments presented by the County have some appeal, they are properly addressed to the Utah legislature and not to this court. If the County desires Utah's Farmland Assessment Act to be applied only to property which is primarily, mainly, or mostly used for agricultural purposes, it should address those arguments to the Utah legislature, not to this court.

If this income test argument which is advanced by the County is adopted then large blocks of land in Utah which are in agricultural production, i.e. "actively devoted to agricultural use", will no longer fit within Utah's Farmland Assessment Act. In certain portions of this state substantial royalty income from oil and gas production is paid to farmers as a

result of petroleum production from reserves underlying those farmers' properties. Under the County's view, this royalty income could operate to disqualify these lands for agricultural assessment. Certainly, Utah's legislature never intended this result. It may be this is the reason why Utah's legislature did not include a comparative income test in Utah's Farmland Assessment Act as is a requirement for agricultural assessment in some other states. See W.R. Company v. North Carolina Property Tax Comm., 48 NC App. 245, 269 S.E.2d 636 (1980).

In order to infuse some measure of credibility in its argument, the County has sought the definition of "devoted" from numerous sources including case law speaking to recreational use of property, i.e. Otis Lodge, Inc. v. Comm. of Taxation, 295 Minn. 80, 206 N.W.2d 3 (1972), admiralty, Complaint of McLinn, 744 F.2d 677 (9th Cir. 1984), and Webster's Ninth New Collegiate Dictionary. This may well be useful if "devoted to agricultural use" has a vague or uncertain meaning under Utah's Farmland Assessment Act. However, the meaning of the term "actively devoted to agricultural use" in the Utah Farmland Assessment Act is clear from the context within which the term is used.

Utah Code Ann. § 59-5-88 (1974), supra, states that "land shall be deemed to be in agricultural use when devoted to [i.e. being used for the purpose of] raising of plants and animals useful to man, . . ." Utah Code Ann. § 59-5-91 (1974)

imposes a rollback tax on land which has been assessed under the Farmland Assessment Act when the land is "applied to a use other than agricultural, . . ." Utah Code Ann. § 59-5-95(1) (Supp. 1986) provides that application for assessment under Utah's Farmland Assessment Act for "taxation of land in agricultural use under this act. . ." is to be on a form promulgated by the Commission. Utah Code Ann. § 59-5-96 (1974) states that agricultural assessment is to continue so long as the land remains in agricultural use. It reads as follows:

> Continuance of valuation, assessment and taxation under this act shall depend upon continuance of the land in agricultural use and compliance with the other requirements of this act and not upon continuance in the same owner of title to the land. Liability to the roll-back tax shall attach when a change in use of the land occurs but not when a change in ownership of the title takes place if the new owner continues the land in agricultural use, under the conditions prescribed in this act.

Obviously, the Utah legislature in enacting the Utah Farmland Assessment Act intended that the only relevant criteria for determining assessment under the Act was to be the actual use of the property. Kennecott's property is <u>used</u> for agricultural purposes, and should be assessed under Utah's Farmland Assessment Act.

Maryland has a statute similar to Utah's in permitting assessment for agricultural purposes under a Farmland Assessment Act when the land is "actively devoted to farm or

agricultural use." See Supervisor of Assessments for Montgomery County v. Alsop, 232 Md. 188, 192 A.2d 484, 485 (1963). In the Alsop case, supra, the Maryland Court of Appeals, (Maryland's highest court), considered whether or not an owner of property, who acquired the property for purposes of a country estate, in order to obtain "peace of mind", with no intention of farming the property or becoming a farmer, could have his property qualify for agricultural assessment under Maryland's Farmland Assessment Act if he "permitted a neighboring farmer to graze his cattle on the property, and to use some of the buildings thereon in return for keeping the hay cut and doing general maintenance work on or about the property, without monetary consideration." Id. In that case the Maryland Tax Court, the trial court in that case, denied farmland assessment. In reviewing the Maryland Tax Court's decision, and in determining that the property at issue qualified for assessment under Maryland's Farmland Assessment Act, the Maryland Court of Appeals stated as follows:

> The tax court seems to have misconstrued both the letter and policy of the constitutional and statutory provisions and, by so doing, misapplied the law to the facts. Not only did the Legislature declare that it was in the general public interest that farming be fostered and encouraged in order to maintain readily available sources of food and dairy products, to promote the continued preservation of open spaces and to prevent the forced conversation of such spaces to more intensive uses as a result of economic pressures caused by the assessment of land at a rate

> incompatible with the practical use of such land for farming or other agricultural purposes; but the constitutional and statutory provisions are explicit that the assessment of farm land shall be based on a valuation commensurate with the use of such land for farming. We think the application of the law to the facts of this case impelled the finding of a taxable basis that was favorable to the taxpayer rather than the taxing authority. [Citations omitted].
>
> As we see it, the question here is not whether the owner and taxpayer is personally engaged in a bona fide farm operation or is permitting a neighbor to use the land for grazing cattle without monetary consideration, but instead is whether the land is actively devoted to a "farm or agricultural use." We think it was so used. Id. 192 A.2d 486-87.

Just as in Alsop, Kennecott's land is actively devoted to an agricultural use. The property is farmed; beef cattle are raised and red winter wheat is grown. It should be assessed under Utah's Farmland Assessment Act.

II. NEITHER UTAH'S PRIVILEGE TAX, NOR PROPERTY TAX EXEMPTION LAW, APPLIES TO THIS CASE.

The County seeks to obtain, via the back door, what it cannot obtain by the front door. It does so by arguing that if Kennecott's land qualifies for agricultural assessment then Kennecott should be required to pay a privilege tax on the difference between the property's assessment for agricultural purposes and its assessment otherwise. See Utah Code Ann. § 59-13-73 (Supp. 1986).

However, the privilege tax, by its own terms, only applies to property which "is exempt from taxation." Kennecott's property is not exempt. Under Utah's Farmland Assessment Act this property is simply assessed on a different basis than is other property. The property is much like mining property, i.e. not exempt but assessed on a different basis and by a different method than other property. See Article XIII, Sec. 4, Utah Constitution. Kennecott still pays taxes on this property and will pay taxes even if the property is assessed under Utah's Farmland Assessment Act. In fact, this property will have the same tax levy applied against its assessed value as is applied against the assessed value of all other taxable property in the same taxing district.

The assessment of this property as agricultural property does not constitute an exemption as argued by the County. The exemptions to which Utah's privilege tax apply are set out in Article 13, Section 2 of the Utah Constitution. Article 13, Section 3(2) of the Utah Constitution is that provision which enables the legislature to prescribe by statute that land used for agricultural purposes is to be assessed based upon its agricultural use. Agricultural assessment does not constitute an exemption to which the privilege tax applies.

If the privilege tax were to apply, Utah's Farmland Assessment Act would become completely meaningless. Under the County's argument, any property owner whose property qualified

for agricultural assessment would be subject to privilege taxes on any difference between agricultural value, or assessment, and assessment based upon "fair market or full market value." This cannot be what the legislature intended, or what the people of the State of Utah intended, when Utah's legislature enacted the privilege tax statute, when the legislature enacted the Utah Farmland Assessment Act, or when the people of this state adopted Article XIII, Section 3(2) of the Utah Constitution.

The County argues that the case law dealing with property tax exemptions in the State of Utah and elsewhere applies in construing the language of the Utah Farmland Assessment Act. The argument is that because exemptions are to be narrowly construed, the benefit of Utah's Farmland Assessment Act is to be narrowly extended so as to preclude Kennecott's benefitting from that statute. However, as is pointed out above, agricultural assessment is not an exemption to which the case law addressing exemptions applies. This becomes obvious when one examines the Utah constitutional provisions relating to taxation found in Article XIII of the Utah Constitution. Utah Constitution Article XIII, Sec. 3, provides, in pertinent part, as follows:

> The legislature shall provide by law a uniform and equal rate of assessment on all tangible property in the state, according to its value in money, except as otherwise provided in Section 2 of this Article. [Emphasis added].

Article XIII, Section 2 lists the exemptions from taxation in Utah. Article XIII, Section 3 of the Utah Constitution refers to Article XIII, Section 2 in speaking to property tax exemptions. Article XIII, Section 3 contains the provision of the Utah Constitution which enables the legislature to enact the Utah Farmland Assessment Act, and to prescribe that property used for agricultural purposes is to be assessed based upon its agricultural use. Thus, both the Utah legislature and the people of Utah do not consider agricultural assessment under the Utah Farmland Assessment Act to be either a full or partial tax exemption. The exemptions are set out in the Utah Constitution Article XIII, Section 2, and no exemptions are contained in Article XIII, Section 3 of the Utah Constitution.

Thus, all the law, and those citations by the County in its brief relating to tax exemptions, how exemptions are to be construed, and who is to benefit from exemptions, simply do not apply in this case. Agricultural assessment is not the same, and cannot be considered to be the same, as tax exemption under Utah law.

CONCLUSION

Kennecott, in leasing this property to Johnson Cattle Company and Don Rushton for the production of beef cattle and red winter wheat, has "actively devoted" its land to an agricultural use. Because that land is actively devoted to an

agricultural use, and has been devoted for at least two years prior to 1985, because the agricultural use of this land generates in excess of $1,000 per year in gross income, and because this land has had an application properly submitted, it must be assessed under Utah's Farmland Assessment Act.

The Utah legislature, in enacting the Utah Farmland Assessment Act, and the people of Utah in adopting Article 13, Section 3(2) of the Utah Constitution, intended to encourage landowners to keep their land in agricultural production. That is precisely what is being achieved in this case. Hercules needs this property in order to buffer its rocket manufacturing facilities from neighboring landowners who might construct habitable dwellings. In order to achieve that buffer, Hercules entered into a lease with Kennecott. Both Kennecott and Hercules have continued to lease the property for agricultural production purposes. The land is used for agricultural production.

As a result, the decision of the Commission should be affirmed and the County should be required to assess this property under the Utah Farmland Assessment Act.

RESPECTFULLY SUBMITTED this 15th day of March, 1988.

KENT W. WINTERHOLLER
of and for
PARSONS, BEHLE & LATIMER
Attorneys for Respondent
185 South State Street, Suite 700
P.O. Box 11898
Salt Lake City, UT 84147-0898
Telephone: (801) 532-1234

MAILING CERTIFICATE

I hereby certify that I caused to be mailed, postage prepaid, four (4) true and correct copies of the foregoing BRIEF OF RESPONDENT, STATE TAX COMMISSION OF UTAH EX REL KENNECOTT CORPORATION to the following on this 15th day of March, 1988:

Mr. Maxwell A. Miller
Assistant Attorney General
130 State Capitol Bldg.
Salt Lake City, Utah 84114

Glen E. Davies, Esq.
310 South Main Street, Suite 1200
Salt Lake City, Utah 84111

Bill Thomas Peters
Special Deputy Salt Lake County Attorney
Kinghorn, Peters, Probst & Sloan
No. 9 Exchange Place, Suite 1000
Salt Lake City, Utah 84111

222:030888A

ADDENDUM

Sec. 2. [Tangible property to be taxed — Value ascertained — Exemption of state and municipal property — Exemption of tangible personal property held for sale or processing — Exemption of property used for irrigating land — Exemption of property used for electrical power — Remittance or abatement of taxes of poor — Exemption of residential and household property — Disabled veterans' exemption — Intangible property — Legislature to provide annual tax for state.]

(1) All tangible property in the state, not exempt under the laws of the United States, or under this Constitution, shall be taxed at a uniform and equal rate in proportion to its value, to be ascertained as provided by law.

(2) The following are property tax exemptions:

(a) The property of the state, school districts, and public libraries;

(b) The property of counties, cities, towns, special districts, and all other political subdivisions of the state, except that to the extent and in the manner provided by the Legislature the property of a county, city, town, special district or other political subdivision of the state located outside of its geographic boundaries as defined by law may be subject to the ad valorem property tax;

(c) Property owned by a nonprofit entity which is used exclusively for religious, charitable or educational purposes;

(d) Places of burial not held or used for private or corporate benefit; and

(e) Farm equipment and farm machinery as defined by statute. This exemption shall be implemented over a period of time as provided by statute.

(3) Tangible personal property present in Utah on January 1, m., which is held for sale or processing and which is shipped to final destination outside

this state within twelve months may be deemed by law to have acquired no situs in Utah for purposes of ad valorem property taxation and may be exempted by law from such taxation, whether manufactured, processed or produced or otherwise originating within or without the state.

(4) Tangible personal property present in Utah on January 1, m., held for sale in the ordinary course of business and which constitutes the inventory of any retailer, or wholesaler or manufacturer or farmer, or livestock raiser may be deemed for purposes of ad valorem property taxation to be exempted.

(5) Water rights, ditches, canals, reservoirs, power plants, pumping plants, transmission lines, pipes and flumes owned and used by individuals or corporations for irrigating land within the state owned by such individuals or corporations, or the individual members thereof, shall be exempted from taxation to the extent that they shall be owned and used for such purposes.

(6) Power plants, power transmission lines and other property used for generating and delivering electrical power, a portion of which is used for furnishing power for pumping water for irrigation purposes on lands in the state of Utah, may be exempted from taxation to the extent that such property is used for such purposes. These exemptions shall accrue to the benefit of the users of water so pumped under such regulations as the Legislature may prescribe.

(7) The taxes of the poor may be remitted or abated at such times and in such manner as may be provided by law.

(8) The Legislature may provide by law for the exemption from taxation: of not to exceed 45% of the fair market value of residential property as defined by law; and all household furnishings, furniture, and equipment used exclusively by the owner thereof at his place of abode in maintaining a home for himself and family.

(9) Property owned by disabled persons who served in any war in the military service of the United States or of the state of Utah and by the unmarried widows and minor orphans of such disabled persons or of persons who while serving in the military service of the United States or the state of Utah were killed in action or died as a result of such service may be exempted as the Legislature may provide.

(10) Intangible property may be exempted from taxation as property or it may be taxed as property in such manner and to such extent as the Legislature may provide, but if taxed as property the income therefrom shall not also be taxed. Provided that if intangible property is taxed as property the rate thereof shall not exceed five mills on each dollar of valuation.

(11) The Legislature shall provide by law for an annual tax sufficient, with other sources of revenue, to defray the estimated ordinary expenses of the state for each fiscal year. For the purpose of paying the state debt, if any there be, the Legislature shall provide for levying a tax annually, sufficient to pay the annual interest and to pay the principal of such debt, within twenty years from the final passage of the law creating the debt.

Compiler's Notes. — The 1979 proposed amendments to this section by House Joint Resolutions Nos 23 and 25 were repealed and withdrawn by Senate Joint Resolution No. 6, Laws 1980

Laws 1980, Senate Joint Resolution No. 6, proposed to amend Article XIII. The proposed amendment was submitted to the electors at the general election in 1980 and failed to pass because it did not receive the necessary majority.

The 1982 amendment was proposed by Senate Joint Resolution No. 3, Laws 1982 and was approved at the general election on November 2, 1982 to become effective January 1, 1983. Prior to amendment, the section read as fol-

Sec. 3. [Assessment and taxation of tangible property — Livestock — Land used for agricultural purposes.]

(1) The Legislature shall provide by law a uniform and equal rate of assessment on all tangible property in the state, according to its value in money, except as otherwise provided in Section 2 of this Article. The Legislature shall prescribe by law such provisions as shall secure a just valuation for taxation of such property, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its tangible property, provided that the Legislature may determine the manner and extent of taxing livestock.

(2) Land used for agricultural purposes may, as the Legislature prescribes, be assessed according to its value for agricultural use without regard to the value it may have for other purposes.

Sec. 4. [Mines and claims to be assessed — Basis and multiple — What to be assessed as tangible property.]

All metalliferous mines or mining claims, both placer and rock in place, shall be assessed as the Legislature shall provide; but the basis and multiple now used in determining the value of metalliferous mines for taxation purposes and the additional assessed value of $5.00 per acre thereof shall not be changed before January 1, 1935, nor thereafter until otherwise provided by law. All other mines or mining claims and other valuable mineral deposits, including lands containing coal or hydrocarbons and all machinery used in mining and all property or surface improvements upon or appurtenant to mines or mining claims, and the value of any surface use made of mining claims, or mining property for other than mining purposes, shall be assessed as other tangible property.

PART 5

FARMLAND ASSESSMENT ACT

59-2-501. Short title.

This part is known as the "Farmland Assessment Act."

History: C. 1953, 59-5-86, enacted by L. 1969, ch. 180, § 1; renumbered by L. 1987, ch. 4, § 103.

Amendment Notes. — The 1987 amendment, effective February 6, 1987, renumbered this section which was formerly § 59-5-86 and substituted the present provisions for the former provisions which read "This act shall be known and may be cited as the 'Farmland Assessment Act of 1969'".

Retrospective Operation. — Laws 1987, ch 4, § 307 provides: "This act has retrospective operation to January 1, 1987, except for Sections 59-2-201, 59-2-205, and 59-2-207, which take effect January 1, 1988."

Section
59-5-97. Separation of land — Use of part for other than agricultural purposes.

59-5-86. Short title of act.

Law Reviews. — Preserving Utah's Open Spaces, Owen Olpin, 1973 Utah L. Rev 164.

59-5-87. Value of land actively devoted to agricultural use.

(1) For general property tax purposes and land subject to the privilege tax imposed by section 59-13-73 owned by the state or any political subdivision thereof, the value of land, not less than five contiguous acres in area, unless otherwise provided under subsection (2), which has a gross income, not including rental income, of $1000 per year, is actively devoted to agricultural use, which has been so devoted for at least two successive years immediately preceding the tax year in issue, shall, on application of that owner, and approval thereof as hereinafter provided, be that value which such land has for agricultural use.

(2) The tax commission may grant a waiver of the acreage limitation, upon appeal by the owner and submission of proof that the owner or a purchaser or lessee obtains 80% or more of his income from agricultural products on an area of less than five contiguous acres.

(3) The tax commission may grant a waiver of the income limitation for the tax year in issue, upon appeal by the owner and submission of proof that the land has been valued on the basis of agricultural use for at least two years immediately preceding that tax year, and that the failure to meet the income requirements for that tax year was due to no fault or act of the owner or a purchaser or lessee, whether that act is one of omission or commission. "Fault" shall not be construed to include the intentional planting of crops or trees which because of the maturation period of such crops or trees prevent the owner, purchaser, or lessee from achieving the income

59-5-88. "Agricultural use" defined.—Land shall be deemed to be in agricultural use when devoted to the raising of plants and animals useful to man, including but not limited to: forages and sod crops; grains and feed crops; dairy animals, poultry, livestock, including beef cattle, sheep, swine, horses, ponies, mules or goats including the breeding and grazing of any or all of such animals; bees, fur animals, trees, fruits of all kinds, including grapes, nuts and berries; vegetables, nursery, floral, and ornamental stock; or when devoted to and meeting the requirements and qualifications for payments or other compensation pursuant to a crop-land retirement program under an agreement with an agency of the state or federal government.

History: C. 1953, 59-5-88, enacted by L. 1969, ch. 180, § 3.

Collateral References.
Taxation⇐348.
84 C.J.S. Taxation § 411.

59-5-89. Land actively devoted to agricultural use — Additional requirements — Application for assessment under act — Change in land use — Land used for religious or charitable purposes.

Land which is actively devoted to agricultural use is eligible for valuation, assessment and taxation each year it meets the following qualifications:

(1) It has been so devoted for at least the two successive years immediately preceding the tax year for which valuation under this act is requested;

(2) The area of land is not less than five contiguous acres when measured in accordance with the provisions of section 59-5-94, except where devoted to agricultural use in conjunction with other eligible acreage, and when the gross sales of agricultural products produced thereon together with any payments received under a crop-land retirement program have averaged at least $1000 per year, not including rental income, during the two year period immediately preceding the tax year in issue; and

(3) (a) Application by the owner of the land for valuation hereunder is submitted on or before January 1 of the tax year to the county assessor in which the land is situated on the form prescribed by the state tax commission. The county assessor shall continue to accept applications filed within 60 days after January 1 upon payment of a late filing fee in the amount of $25, which shall be paid to the county treasurer.

(b) The county assessor shall have all applications filed under subsection (a) recorded by the county recorder. All necessary filing fees shall be paid by the owner at the time his application is filed. Whenever land, which is or has been in agricultural use and is or has been valued, assessed and taxed under the provisions of this act, is applied to a use other than agricultural, the owner shall, within 90 days thereafter, notify the county assessor and pay the roll-back tax imposed by section 59-5-91. Upon receipt of notice, unless payment of the roll-back tax accompanies that notice, the county assessor shall cause the following statement to be recorded by the county recorder: "On the _____ day of _____, 19____, this land became subject to the roll-back tax imposed by section 59-5-91."

(c) Notwithstanding the provisions of (3)(a) and (b) of this section, whenever the owner of land has filed or becomes eligible for valuation under this act, he need not file again or give any notice to the county assessor until a change in the land use occurs. Failure of the owner to notify the county assessor and pay the roll-back tax imposed by section 59-5-91, within 90 days after any change in land use, will subject the owner to a penalty of 100% of the computed roll-back tax due.

(d) Any change in land use or other withdrawal of land from the provisions of this act shall be subject to the provisions of this section whether the change or withdrawal is voluntary or involuntary, unless the change in use is due to ineligibility resulting solely from amendments to this act.

(e) Land which becomes exempt from taxation as provided in section 59-2-30 shall not be considered withdrawn from the provisions of this act as long as the land continues to be used for agricultural purposes.

59-5-90. "Indicia of value" for agricultural use determined by tax commission.

The assessor in valuing land which qualifies as land actively devoted to agricultural use under the test prescribed by this act, and as to which the owner thereof has made timely application for valuation, assessment and taxation hereunder for the tax year in issue, shall consider only those indicia of value which such land has for agricultural use as determined by the state tax commission. The county board of equalization shall review the assessments each year as provided in section 59-7-1.

History: C. 1953, 59-5-90, enacted by L. 1969, ch. 180, § 5; L. 1975, ch. 174, § 3.

Compiler's Notes. — The 1975 amendment made no change in this section.

59-5-91. Assessed land subsequently devoted to other than agricultural use—"Roll-back tax"—Definition and determination of amount—Disposition of collected tax.—When land which is or has been in agricultural use and is or has been valued, assessed and taxed under the provisions of this act, is applied to a use other than agricultural, it shall be subject to an additional tax hereinafter referred to as the "roll-back tax," which tax shall be a lien upon the land and become due and payable at the time of the change in use.

As used in this act, the word "roll-back" means the period preceding the change in use of the land not to exceed five years during which the land was valued, assessed and taxed under the provisions of this act.

The assessor shall ascertain the amount of the roll-back tax chargeable on land which has undergone a change in use by computing the difference between the tax paid, while participating under this act, and that which would have been paid had the property not been under this act. When the assessor has collected the roll-back tax, he shall remit it to the county treasurer and certify to the county recorder that the roll-back tax lien on the property has been satisfied.

History: C. 1953, 59-5-91, enacted by L. 1969, ch. 180, § 6; L. 1973, ch. 137, § 3.

59-5-92. "Roll-back tax" — Lien — Right to review judgment — Procedure.

The assessment of the roll-back tax imposed by section 59-5-91, the attachment of the lien for such taxes, and the right of the owner or other interested party to review any judgment of the county board of equalization affecting such roll-back tax, shall be governed by the procedures provided for the assessment and taxation of real property not valued, assessed and taxed under the provisions of this act. The roll-back tax collected shall be paid into the county treasury and paid by the treasurer to the various taxing units pro rata in accordance with the levies for the current year.

History: C. 1953, 59-5-92, enacted by L. 1969, ch. 180, § 7; L. 1975, ch. 174, § 4.

Compiler's Notes. — The 1975 amendment made no change in this section.

59-5-93. Area included under act—Site of farmhouse excluded.—In determining the total area of land actively devoted to agricultural use there shall be included the area of all land under barns, sheds, silos, cribs, greenhouses and like structures, lakes, dams, ponds, streams, irrigation ditches and like facilities, but land under and such additional land as may be actually used in connection with the farmhouse shall be excluded in determining such total area.

History: C. 1953, 59-5-93, enacted by L. 1969, ch. 180, § 8.

Collateral References.
Taxation⇐348.
84 C.J.S. Taxation § 411.

59-5-94. Structures and land—Assessment same as other property.—All structures, which are located on land in agricultural use and the farmhouse and the land on which the farmhouse is located, together with the additional land used in connection therewith, shall be valued, assessed and taxed by the same standards, methods and procedures as other taxable structures and other land in the county.

History: C. 1953, 59-5-94, enacted by L. 1969, ch. 180, § 9.

Collateral References.
Taxation⇐348.
84 C.J.S. Taxation § 411.

59-5-95. Application forms — Certification by landowner — Consent to audit and review — Purchaser's or lessee's affidavit.

(1) Application for valuation, assessment and taxation of land in agricultural use under this act shall be on a form prescribed by the state tax commission, and provided for the use of the applicants by the county assessor. The form of application shall provide for the reporting of information pertinent to the provisions of this act. A certification by the owner that the facts set forth in the application are true may be prescribed by the state tax commission to be in lieu of a sworn statement to that effect. Statements so certified shall be considered as if made under oath and subject to the same penalties as provided by law for perjury.

(2) All owners applying for participation under the provisions of this act and all purchasers or lessees signing affidavits as provided under subsection (3) shall be deemed to have given their consent to be subject to field audit and review by both the state tax commission and the county assessor and such consent shall be a condition to the acceptance of any application or affidavit.

(3) An owner of lands eligible for valuation, assessment and taxation under the provisions of this act due to the use of that land by, and the gross income qualifications of, a purchaser or lessee, may qualify those lands by submitting together with his application under subsection (1), an affidavit from that purchaser or lessee certifying those facts relative to his use of the land and his gross income which would be necessary for qualification of those lands under the provisions of this act.

History: C. 1953, 59-5-95, enacted by L. 1969, ch. 180, § 10.

Collateral References.
Taxation⇐348.
84 C.J.S. Taxation § 411.

59-5-96. Change of ownership.—Continuance of valuation, assessment and taxation under this act shall depend upon continuance of the land in agricultural use and compliance with the other requirements of this act and not upon continuance in the same owner of title to the land. Liability to the roll-back tax shall attach when a change in use of the land occurs but not when a change in ownership of the title takes place if the new owner continues the land in agricultural use, under the conditions prescribed in this act.

History: C. 1953, 59-5-96, enacted by L. 1969, ch. 180, § 11.

Collateral References.
Taxation⇐348.
84 C.J.S. Taxation § 411.

59-13-73. Privilege tax upon possession and use of tax-exempt property — Exceptions.

There is imposed and there shall be collected a tax upon the possession or other beneficial use enjoyed by any private individual, association, or corporation of any property, real or personal, which for any reason is exempt from taxation, when such property is used in connection with a business conducted for profit, except where the use is by way of a concession in or relative to the use of a public airport, park, fairground, or similar property which is available as a matter of right to the use of the general public, or where the possessor or user is a religious, educational or charitable organization or the proceeds of such use or possession inure to the benefit of such religious, educational or charitable organization and not to the benefit of any other individual association or corporation. No tax shall be imposed upon the possession or other beneficial use of public land occupied under the terms of grazing leases or permits issued by the United States or the state of Utah or upon any easement unless the lease, permit or easement entitles the lessee or permittee to exclusive possession of the premises to which the lease, permit or easement relates. Every lessee, permittee, or other holder of a right to remove or extract the mineral covered by his lease, right, permit or easement except from brines of the Great Salt Lake, is deemed to be in possession of the premises, notwithstanding the fact that other parties may have a similar right to remove or extract another mineral from the same lands or estates.